Yayasan Melaka v Photran Corp Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–1054 OF 2003
LEE SWEE SENG JC
8 NOVEMBER 2011

Civil Procedure — Judgment and orders — Default judgment — Setting aside — Whether delay in filing application to set aside — Whether judgment entered regular or irregular — Whether first defendant had defence on merits

On 23 November 1994, one Bryn Williams ('BW') and Lim Lek Yan ('the second defendant') entered into a memorandum of understanding ('MOU') with the state government of Melaka and Zeron Sdn Bhd ('Zeron') to establish and become members of a joint venture company, Phototran Corp Sdn Bhd ('the first defendant'). The first defendant, joint venture vehicle, was at all material times licensed by Phototran USA to manufacture and market high performance optical and electricity conducive, film coated products ('the products') in Malaysia. Following the MOU, the parties to the joint venture, namely, Yayasan Melaka ('the plaintiff'), the nominee of the state government of Melaka, Zeron, BW and the first defendant executed a shareholders' agreement ('the SA'). It was the understanding between the parties to the SA that each of them would contribute towards all payments to be met by the first defendant, such as, the licence fee payments to Phototran USA in respect of the licence granted to the first defendant, payments for the purchase of the machinery and also the contributions towards the first defendant's working capital. After the execution of the SA, the plaintiff had paid RM4,600,000 as its contribution to the first defendant. According to the first defendant, when the plaintiff was required to make a further payment of RM4,600,000 in June 1997, it was unwilling to do so unless the first defendant accepted its condition. The plaintiff's condition was that its contributions of RM9,200,000 (RM4,600,000 + RM4,600,000) were to be treated as a loan from the plaintiff to the first defendant. The first defendant alleged that since it urgently required the sum of RM4,600,000 it was compelled to accept the condition imposed by the plaintiff. Thus, a loan agreement in respect of the sum of RM9,200,000 was executed between the plaintiff and the first defendant. In addition the plaintiff had also asked the second defendant to be liable under a letter of indemnity, which the latter had done. On 30 June 2003, the plaintiff filed the present action against the defendants for the recovery of the RM9.2m, which it had allegedly loaned to the first defendant. The plaintiff's action against the first defendant had been premised on the purported loan agreement between the plaintiff and the first defendant, while its action against the second defendant was under a shareholder letter of

indemnity entered into between the plaintiff and the second defendant. On 12 August 2003, the plaintiff entered judgment in default of appearance ('JID') against the first defendant for the sum of RM9.2m with interest and costs. On 31 January 2011, the first defendant applied to set aside the JID on the grounds that the judgment entered was irregular and that alternatively the first defendant had a defence on the merits. The senior assistant registrar dismissed the first defendant's application and hence the present appeal. The first defendant submitted that the plaintiff, which had majority control of the first defendant, had by deliberate default allowed a judgment in default to be entered against it. In support of its theory of conspiracy the first defendant referred to another incident that occurred on 7 February 20007 in which a company wholly owned by a corporation established by the State Government of Malacca had commenced a claim for a sum of RM1,505 against the first defendant. The first defendant submitted that the plaintiff had employed the same silent strategy in this case and that JID was again taken against the first defendant for the sum of RM1,505 and costs. According to the first defendant, the deliberate inaction by the plaintiff in not resisting the winding up had finally led to the first defendant being wound up for the debt of RM1,505. The plaintiff submitted that the JID should not be set aside owing to the long delay of seven years between the date of the JID and the date of application to set aside the JID. The second defendant, a minority shareholder and a director of the first defendant submitted that the long delay was occasioned by having to write to the official receiver and liquidator of the first defendant for sanction to proceed to apply to set aside the JID and having to affirm affidavits on behalf of the first defendant for this purpose. It was thus the first defendant's case that the plaintiff had in effect paralysed the first defendant by making it totally unable to act without the consent of the official receiver or the court.

Held, allowing the appeal with costs in the cause:

(1) It was found that the JID was entered against the first defendant because the board of the first defendant through its inaction had allowed no appearance to be entered and thus by design allowed a default judgment to be entered against the first defendant. The same inaction had also led to the first defendant being wound up. This court was satisfied with the explanation given by the defendants for the long delay in applying to set aside the JID. In the circumstances, the delay if any was not fatal and every facility ought to be extended to the first defendant for it to ventilate its defence. To allow the JID to stand would be oppressive to the first defendant in what on the face of it appears to be a dereliction of duties on the part of the board of the first defendant, who by design allowed a default judgment to be entered and by further deliberate design allowed a winding up petition to proceed by default. As such, the present case was one that required intervention by the court (see paras 17 & 20).

(2) Further, the plaintiff had not verified when the JID was served on the first

defendant. In the circumstances the first defendant was entitled to take the position that the JID was not served on it. To allow a judgment in default to be entered in the present case would be to send a message in corporate governance that the majority can ride rough-shod over the minority by refusing to enter an appearance for the company and allowing by default a judgment to be entered against the company controlled by the majority. In the circumstances, the JID entered was an irregular judgment and the first defendant had acted promptly to have it set aside. The first defendant was entitled to have the JID set aside *ex debito justitiae* (see paras 18 & 25).

(3) The crux of the first defendant's proposed defence was that it was induced and coerced in entering into the loan agreement by illegitimate pressure put upon it by the plaintiff, or alternatively that the loan agreement was void and unenforceable. It was found that viewed in the light of the history of the case and the events that led to the joint venture, the defence of undue influence and coercion should be allowed to be ventilated. The first defendant's affidavits in support of its application to set aside the JID, which had disclosed the defences that the first defendant would be relying on, proved that there was a defence on the merits, and the plaintiff could not be said to be prejudiced as to the defence raised. The court also took into consideration the fact that the first defendant would be referring the present dispute to arbitration and as such did not want to be unfairly construed as having taken a step in the proceeding which would preclude it from referring the present matter to arbitration (see paras 33 & 58).

[Bahasa Malaysia summary

Pada 23 November 1994, Bryn Williams ('BW') dan Lim Lek Yan ('defendan kedua') telah memasuki memorandum persefahaman ('MOU') dengan Kerajaan Negeri Melaka dan Zeron Sdn Bhd ('Zeron') untuk menubuhkan dan menjadi ahli-ahli syarikat usahasama Phototran Corp Sdn Bhd ('defendan pertama'). Defendan pertama, jentera usahasama, adalah pada setiap masa matan berlesen dengan Phototran USA untuk membuat dan memasarkan optik berprestasi tinggi dan elektrik yang kondusif, produk-produk bersalut filem di Malaysia. Berikutan MPU itu, pihak-pihak kepada usahasama itu, terutamanya Yayasan Melaka ('plaintif'), calon Kerajaan Negeri Melaka, Zeron, BW dan defendan pertama telah memasuki perjanjian pemegang saham ('PPS'). Wujud persefahaman antara pihak-pihak kepada PPS bahawa setiap daripada mereka akan menyumbang kepada semua bayaran yang perlu dipenuhi oleh defendan pertama, bayaran untuk belian mesin dan juga sumbangan kepada modal kerja defendan pertama. Setelah PPS dimasuki, plaintif telah membayar RM4,600,000 sebagai sumbangannya kepada defendan pertama. Menurut defendan pertama, apabila plaintif dikehendaki membuat bayaran selanjutnya untuk jumlah RM4,600,000 pada bulan Jun

1997, ia enggan berbuat demikian kecuali jika defendan pertama menerima syaratnya. Syarat plaintif adalah agar sumbangannya sebanyak RM9,200,000 (RM4,600,000 + RM4,600,000) dianggap sebagai pinjaman daripada plaintif kepada defendan pertama. Defendan pertama mengatakan oleh kerana ia memerlukan segera jumlah RM4,600,000 itu ia terpaksa menerima syarat yang dikenakan oleh plaintif. Oleh itu, perjanjian pinjaman berkaitan jumlah RM9,200,000 telah dimasuki antara plaintif dan defendan pertama. Tambahan plaintif juga meminta defendan kedua bertanggungjawab di bawah surat indemniti, yang mana telah dilakukannya. Pada 30 Jun 2003, plaintif telah memfailkan tindakan ini terhadap defendan-defendan untuk mendapat balik sejumlah RM9.2 juta, yang dikatakan ia telah pinjam kepada defendan pertama. Tindakan plaintif terhadap defendan pertama berasaskan perjanjian pinjaman antara plaintif dan defendan pertama, manakala tindakannya terhadap defendan kedua adalah di bawah surat indemniti yang dimasuki antara plaintif dan defendan kedua. Pada 12 Ogos 2003, plaintif telah memasukkan penghakiman ingkar kehadiran ('PIK') terhadap defendan pertama untuk jumlah RM9.2 juta dengan faedah dan kos. Pada 31 Januari 2011, defendan pertama telah memohon untuk mengetepikan PIK itu atas alasan bahawa penghakiman yang dimasuki di luar aturan dan bahawa secara alternatif defendan pertama mempunyai pembelaan berasaskan merit. Penolong Kanan Pendaftar telah menolak permohonan defendan pertama dan justeru itu rayuan ini. Defendan pertama telah berhujah bahawa plaintif, yang mempunyai kawalan majoriti ke atas defendan pertama, telah ingkar dengan sengaja membenarkan penghakiman ingkar dimasukkan terhadapnya. Bagi menyokong teori konspirasinya defendan pertama telah merujuk kepada satu lagi kejadian yang berlaku pada 7 Februari 2007 di mana syarikat yang dimiliki sepenuhnya oleh perbadanan yang ditubuhkan oleh Kerajaan Negeri Melaka telah memulakan tuntutan untuk jumlah RM1,505 terhadap defendan pertama. Defendan pertama berhujah bahawa plaintif telah menggunakan strategi yang sama dalam kes ini dan bahawa PIK sekali lagi telah dibuat terhadap defendan pertama untuk jumlah RM1,505 dan kos. Menurut defendan pertama, tindakan yang sengaja tidak dilakukan oleh plaintif di mana tidak menentang penggulungan akhirnya membawah kepada defendan pertama digulung untuk hutang sejumlah RM1,505. Plaintif berhujah bahawa PIK itu patut diketepikan disebabkan kelewatan tujuh tahun antara tarikh PIK dan pengarah defendan pertama berhujah bahawa kelewatan yang lama itu disebabkan oleh kerana perlu menulis kepada pegawai penerima dan pelikuidasi defendan pertama untuk sanksi untuk meneruskan permohonan mengetepikan PIK dan perlu mengesahkan affidavit bagi pihak defendan pertama bagi tujuan ini. Oleh itu adalah kes defendan pertama bahawa plaintif telah melemahkan defendan pertama dengan menyebabkannya langsung tidak dapat bertindak tanpa persetujuan pegawai penerima atau mahkamah.

Diputuskan, membenarkan rayuan dengan kos dalam kausa:

(1) Adalah didapati bahawa PIK telah dimasukkan terhadap defendan

pertama kerana lembaga defendan pertama melalui ketiadaan tindakannya telah membenarkan ketidakhadiran dimasukkan dan oleh itu dengan sengaja membenarkan penghakiman ingkar dimasukkan terhadap defendan pertama. Ketiadaan tindakan sama juga telah membawa kepada defendan pertama digulungkan. Mahkmah ini berpuas hati dengan penjelasan yang diberikan oleh defendan-defendan kerana kelewatan yang lama untuk memohon penepian PIK itu. Dalam keadaan berikut, kelewatan jika ada tidak memudaratkan dan setiap kemudahan patut dilanjutkan kepada defendan pertama untuknya mengemukakan pembelaannya. Bagi membenarkan PIK dikekalkan akan menindas defendan pertama di mana apa yang kelihatan sebagai kelalaian kewajipan di pihak lembaga defendan pertama, yang dengan sengaja telah membenarkan penghakiman ingkar dimasukkan dan selanjutnya dengan keingkaran yang disengajakan telah membenarkan petisyen penggulungan diteruskan dengan ingkar. Oleh itu, kes ini menghendaki campur tangan mahkamah (lihat perenggan 17 & 20).

(2) Selanjutnya, plaintif tidak mengesahkan bila PIK itu disampaikan ke atas defendan pertama. Dalam keadaan berikut defendan pertama berhak membuat kesimpulan bahawa PIK itu tidak disampaikan ke atasnya. Untuk membenarkan penghakiman ingkar dimasukkan dalam kes ini adalah dengan menyampaikan mesej tadbir urus korporat bahawa pihak majoriti mengambil kesempatan ke atas pihak minoriti dengan keengganan untuk memasukkan kehadiran syarikat dan membenarkan secara ingkar penghakiman dimasukkan terhadap syarikat yang dikawal oleh majoriti. Dalam keadaan berikut, PIK yang telah dimasukkan adalah penghakiman luar aturan dan defendan pertama telah bertindak dengan segera untuk mengetepikannya. Defendan pertama berhak mengetepikan PIK itu *ex debito justitiae* (lihat perenggan 18 & 25).

(3) Pokok persoalan kepada cadangan pembelaan defendan pertama adalah bahawa ia telah dipujuk dan dipaksa memasuki perjanjian pinjaman melalui desakan tak sah ke atasnya oleh plaintif, atau secara alternatif bahawa perjanjian pinjaman itu adalah tidak sah dan tidak boleh dikuatkuasakan. Adalah didapati bahawa berdasarkan sejarah kes dan kejadian yang membawa kepada usahasama tersebut, pembelaan pengaruh tak wajar dan paksaan patut dibenarkan untuk dikemukakan. Afidavit sokongan defendan pertama berhubung permohonannya untuk mengetepikan PIK itu, yang telah mengemukakan pembelaan bahawa defendan pertama akan bergantung kepada, telah membuktikan bahawa terdapat pembelaan atas merit dan plaintif tidak boleh dikatakan telah diprejudiskan disebabkan pembelaan yang ditimbulkan itu. Mahkamah juga mengambil kira fakta bahawa defendan pertama akan merujuk pertikaian ini kepada penimbangtara dan oleh itu tidak mahu ditafsirkan secara tidak adil sebagai telah mengambil langkah dalam prosiding yang

akan memprejudiskannya daripada merujuk perkara ini kepada penimbangtara (lihat perenggan 33 & 58).] A

Notes

For cases on default judgment, see 2(1) Mallal's Digest (4th Ed 2010, Reissue) paras 4544–4554. B

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Development & Commercial Bank Ltd v Dinesh Kumar Jashbhai Nagjibhai & Ors [2002] 7 MLJ 430; [2002] 3 CLJ 108, HC (refd) C

Fira Development Sdn Bhd v Goidwin Sdn Bhd [1989] 1 MLJ 40, SC (refd)

Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481 (refd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312, SC (refd) D

Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 MLJ 209; [1998] 3 CLJ 335, CA (refd)

Majlis Amanah Rakyat v Ismail bin Maskor & Ors [2006] 3 MLJ 281; [2006] 5 CLJ 230, HC (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, FC (refd) E

Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Bhd) & Anor [2003] 3 MLJ 67; [2003] 6 CLJ 326, HC (refd)

Sharikat Permodalan Kebangsaan Bhd v Jalinan Waja Sdn Bhd [2011] 7 CLJ 865, HC (refd) F

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)

Yayasan Melaka v Photran Corp Sdn Bhd & Anor [2007] 7 CLJ 308, HC (refd)

Legislation referred to G

Rules of the high Court 1980

SM Shanmugan (Aina Shahirah with him) (Lee Hishammuddin Allen & Gledhill) for the plaintiff/respondent.

GK Ganesan (Philip Choong with him) (Philip Choong & Co) for the first defendant/appellant. H

Lee Swee Seng JC:

PROLOGUE I

[1] This is a case of a joint venture that went wrong. The plaintiff said that it had advanced all in RM9.2m to the first defendant, D1, the joint venture vehicle. The plaintiff asked for a loan agreement to be executed between the

plaintiff and D1. The plaintiff also asked for the second defendant, Lim Lek Yan, D2, the other joint venture party to be liable under a letter of indemnity. D2 argued that the sums advanced were for the allotment of shares in D1 to the plaintiff and for the parties respective contributions towards the purchase of machinery. In any event the plaintiff sued for the RM9.2m and obtained a judgment in default against D1. The plaintiff also proceeded with summary judgment against D2 and obtained judgment against D2 for the same.

PROBLEM

[2] According to D2, when the writ and statement of claim were served on D1, the board of D1 which by then was under the control of the plaintiff refused to appoint a solicitor to act on its behalf to enter an appearance even when expressly requested by him to do so. D2 is a minority shareholder and a director in D1. Thereafter a JID was entered by the plaintiff against D1. Subsequently another related company of the Melaka State sued D1 for non-payment of secretarial fees of RM1,505 and obtained another judgment in default because no appearance was entered. A winding up petition was presented for non-payment of RM1,505 against D1 and again the Board of D1 under the control of the plaintiff did nothing to resist the winding up and D1 was eventually wound up. Subsequently D2 as a minority shareholder of D1 and a director of D1 wrote to the official receiver for sanction to proceed to apply to set aside the JID obtained by the plaintiff against D1 and to affirm affidavits on behalf of D1 for the exercise. Upon sanction being granted D1 proceeded with all promptitude to undo what it argues as a gross injustice being done to it by multiple breaches of fiduciary duties owed by, inter alia, the plaintiff to the other joint venture parties and also breach of fiduciary duties by members of the Board of D1 to D1, which Board was under the control of the plaintiff. D1 also alleges coercion, undue influence and/or economic duress in the execution of the loan agreement.

PRAYER

[3] The plaintiff had entered a JID against D1 on 12 August 2003 for the sum of RM9,200,000 and interest at 8%pa from 26 June 1999 till realisation and settlement and costs.

[4] D1 applied on 31 January 2011 to set aside the JID. The application was premised on the fact that the judgment entered was irregular and alternatively D1 has a defence on the merits.

[5] The senior assistant registrar ('SAR') dismissed D1's application and hence the appeal by D1 to this court.

PRINCIPLE

Whether there was delay in applying to set aside the JID

[6] The first thing that is obvious is the long delay between the date of the JID on 12 August 2003 and the date of application to set aside the JID on 31 January 2011. There was a seven year gap. Is such a delay fatal or it all depends on the reasons for the delay?

[7] His Lordship Edgar Joseph Jr JCA (as he then was) in the Federal Court case of *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 at p 376 observed:

> (5) Lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity. Further, under its inherent jurisdiction to prevent an abuse of proceedings, the court has power to set aside a judgment in default despite the defendant's application being out of time if the particular circumstances of the case require it (see pp 3841 and 385A-C); *Atwood v Chichester* (1878) 3 QBD 722 and *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance BM* [1996] 1 MLJ 30 followed …

[8] His Lordship went on to opine at pp 381–385 as follows:

> In other words, in my view, O 83 r 2(4) is merely a statutory enunciation of the fundamental rule of natural justice as expressed in the Latin maxim audi alteram partem (hear the other side) so that the obligation to serve notice of the adjourned hearing of the originating summons remained even if O 83 r 2(4) did not apply. It is a familiar canon of statutory interpretation that unless a contrary intention appears, an enactment by implication imports the principle of the maxim audi alteram partem. It was said by Fortescue J in *R v University of Cambridge* (1723) 1 Stra 557, where Dr Bentley had been deprived of his academic degrees by decree, that the principles goes back to the Garden of Eden. This is how His Lordship put it:
>
> > The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called on to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also.

[9] In my view, the effect of failure on the part of the chargees to notify the chargors of the date of the adjourned hearing was of such fundamental

A importance as to render each and every one of the ex parte orders obtained, in consequence, a nullity. I am supported in this by certain authorities to which I shall now refer.

B *In my view, lapse of time is no bar to a defendant's application to set aside a judgment which is a nullity. (See Atwood v Chichester* (1878) 3 QBD 722*). I am further supported in this by the following passage in a very recent judgment of the Federal Court in Tuan Hj Ahmed Abdul Rahman v Arab- Malaysian Finance Bhd* [1996] 1 ML J 30 *at p 42 is satisfied that:*

(a) *no one has suffered prejudice by reason of the defendant's delay;*

C (b) *alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or*

(c) *to let the judgment stand would constitute oppression. (See Atwood v Chichester* (1878) 3 QBD 722*; Harley v Samson* (1914) 30 TLRL 450*).*

D

[10] We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, *the court has power to set aside a judgment in default, despite the defendant's application being out of time if the particular circumstances of the case require the intervention of the court* (see *Beale v MacGregor* (1886) 2 TLR 311). (Emphasis added.)

E

[11] D1 said that at all material time, the plaintiff was in control of D1. The plaintiff had majority control of the shares in D1 with a 70% of the equity of D1 and had control of the board of D1. D1's board did not file any appearance on behalf of D1 and allowed the plaintiff to enter a JID against D1. The plaintiff's action against D1 filed on 30 June 2003 had been premised on, inter alia, a purported loan agreement dated 26 June 1997 entered into between the plaintiff and D1 ('the loan agreement'). The plaintiff's action against D2 was under a shareholder letter of indemnity dated 26 July 1997 entered into between the plaintiff and D2.

F

G

[12] According to learned counsel for D1, Mr GK Ganesan, on 7 February 2007, Perbadanan Melaka Holdings Sdn Bhd ('Perbadanan Melaka'), a company wholly owned by PKNM, a corporation established by the State Government of Malacca, commenced an action against D1 in the Malacca Magistrate's Court Summons No 72–390 of 2007 claiming for a meagre sum of RM1,505 in respect of certain alleged secretarial fees payable by D1. In support of his theory of conspiracy, Mr GK Ganesan for D1 submitted that similarly but not strangely, no appearance was entered and another judgment in default was taken against D1 on 30 April 2007 for the meagre sum of RM1,505 and costs of RM156 (the magistrate court's JID).

H

I

[13] Surreal as it may seem, a winding up petition was presented against D1 by Perbadanan Melaka and no attempt was made by the majority of the

directors of D1 who were aligned to the plaintiff from either paying up the judgment sum or otherwise resist the winding up petition. In the course of time, D1 was then wound up on 1 December 2008.

[14] D1 that had initially not intimated any intention to defend both the High Court action and the magistrate court action and indeed had by deliberate default allowed a judgment in default to be entered against it in both the High Court and the magistrate court is now being further paralysed as its board has become totally functus and totally unable to act except with the consent of the liquidator or of the court. How does a company like D1 who had lost its voice by design of the majority of the Board and by default through operation of the law of winding up after it had been wound up, regain its voice and be heard again?

[15] D2 being one of the directors of D1, moved and applied for sanction from the official receiver and liquidator of D1 to act in the name of D1 and on behalf of D1 to inter alia set aside the JID in the High Court. Sanction was given and confirmed by the Jabatan Insolvensi Malaysia on 27 January 2011.

[16] The official receiver and liquidator for D1 by letter dated 30 November 2010 duly appointed Messrs Philip Choong & Co as solicitors to act for D1 to file an application to set aside the JID and to defend the plaintiff's claim herein. Sanction was also given by the official assignee for D2 to affirm affidavits on behalf of D1 and the official receiver. The application to set aside the JID was duly filed on 31 January 2011.

[17] In the light of the explanation given I am satisfied that the long delay has been sufficiently explained. When D1 could have entered appearance and defended the action, it was prevented to by the Board of D1 itself. The majority of the Board of D1 had by design allowed a default of appearance to take place with the consequence that a JID was entered against D1. After D1 was served with a winding up petition, again by design a winding up petition was allowed by default to proceed to the eventual winding up of D1. After winding up of D1 on 1 December 2008, D1 was once again deprived of a voice until the sanction of the official receiver given on 27 January 2011. The application to set aside the JID was promptly filed on 31 January 2011. I cannot see any unexplained delay and if there is delay nevertheless, this is certainly one instance where it is not fatal and every facility should be extended to it for it to ventilate its defence. To allow the JID to stand would be oppressive to D1 in what on the face of it appears to be a dereliction of duties on the part of the board of D1 who by design allowed a default judgment to be entered against it and by further deliberate design allowed a winding up petition to proceed by default to its eventual winding up for a dismal sum of RM1,505. If there is a case that calls for an intervention by the court, this is certainly one such case.

[18] Further the plaintiff in its affidavits has not stated when the JID was served on D1. The plaintiff had raised the issue of delay but this issue as to whether the JID was served on D1 was not one of the factors relied on by the plaintiff. In the circumstance D1 is entitled to take the position that the JID was not served on D1. That being the case the dicta of His Lordship Abdul Aziz Mohamad J (as His Lordship then was) in *Development & Commercial Bank Ltd v Dinesh Kumar Jashbhai Nagjibhai & Ors* [2002] 7 MLJ 430 at p 430–431; [2002] 3 CLJ 108at p 109 is relevant:

> If a plaintiff intends to use O 42 r 13 of the RHC to shut out a defendant, he must serve the judgment, otherwise the rule will not begin to operate as time has not begun to run against the defendant. There is no justification to read 'within thirty days after the receipt of the judgment or order by him' as meaning within thirty days after he becomes aware of the judgment or order. The application should therefore not have been dismissed on that ground. (at p 110 h–i)

Whether the JID entered was regular or irregular

[19] When is a judgment in default said to be an irregular judgment? His Lordship Edgar Joseph Jr FCJ in the Federal Court case of *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 at p 36 gives this succinct summary:

> It is elementary that an *irregular judgment* is one which has been entered *otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.*
>
> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, *the defendant is entitled to have it set aside ex debito justitiae, that is to say, irrespective of the merits and without terms.* Having said that, it should be added that the application to set aside such a judgment should be made: (a) with *reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity.* (See O 2 r 2(i) of the Rules of the High Court 1980). (Emphasis added.)

[20] Here the JID had been entered because the Board of D1 through its action or more particularly its inaction allowed no appearance to be entered and thus by design allowed a default judgment to be entered against D1. The final seal of silence or so the board of D1 thought, was by the same silent strategy of allowing Perbadanan Melaka to obtain a judgment in default against it and then to sit still and fold its arms in a deliberate inaction to suffer it being wound up by Perbadanan Melaka for a paltry sum of RM1,505.

[21] At the Board of Directors' meeting of D1 on 10 April 2003 the directors representing the plaintiff resolved to change the registered address of D1 from

No 94, Jalan Maarof, Bangsar, 59000, Kuala Lumpur to Aras 15-16, 110, Bangunan Yayasan Melaka, Off Jalan Hang Tuah, 75300, Melaka. The Board also resolved to appoint Cik Masitah bt Ismail as D1's secretary in place of D2 and further maintained that the plaintiff would not invest any more money in D1. Subsequent to that meeting the company secretary and its registered office was changed ('exh LLY32').

[22] The plaintiff's solicitors Messrs Lee Hishamuddin issued letters of demand dated 17 March 2003 to the defendants herein and demanded for return of the alleged loan sum of RM9,200,000. The writ and statement of claim were served by the plaintiff at D1's new registered office.

[23] D2 vide his solicitors Messrs Philip Choong & Co requested D1 to file an appearance to the action and to apply for a stay of proceeding and to refer the dispute to arbitration pursuant to cl 15 of the loan agreement. The plaintiff's representatives forming the majority of the directors of the Board of Directors of D1 failed to take any action on behalf of D1. Naturally a JID was taken against D1. The other directors are Bryn Williams and D2. According to learned counsel for the plaintiff Mr SM Shanmugam, D2 was guilty of inaction in that being a shareholder, he could have filed a derivative action to cause D1 to defend this action.

[24] However Bryn Williams and D2 did on 17 October 2003 file a s 181 petition against the plaintiff and D1 as minority shareholders of D1. One wonders why D2 should be put to further costs, expense and delay in filing a derivative action to defend the action? Leave of court would have to be obtained first and by the time it is obtained a judgment in default would have already been entered against D1. Neither is learned counsel for the plaintiff suggesting for a moment that if leave is applied for, D1 or the remaining of the directors who are representatives of the plaintiff, would not be objecting to the leave. In short it is neither practical nor feasible given the brief time there is to enter appearance.

[25] What the plaintiff should have done if it had wanted to enter judgment on what it considers to be an undisputed debt owing by a subsidary would be to call for a Board meeting of D1 and to let the directors of D1 deliberate. Finally a vote is taken and the vote may be to enter into a consent judgment or a judgment by admission with the plaintiff. Which ever party being aggrieved in that the decision has been made in breach of the directors fiduciary duties to D1 may apply to court for the necessary remedy. To allow a judgment in default to be entered is to disregard the directing mind and will of the Board of D1 who ought to be heard. It is to send a message in corporate governance that it is perfectly all right for the board of D1 which company is being sued to sit idly by and speak not a word and do not a thing so that by the default of the board

of D1, whatever that the plaintiff purposed to do, it may do so promptly. To allow that would be to set a dangerous precedent-sending a message that the majority can ride rough-shod over the minority by just refusing by sheer strength of its majority numbers to enter an appearance for the company and to allow by default a judgment to be entered against the company controlled by the majority.

[26] Such an irregularity where the plaintiff was fully aware of and by its overpowering presence controls the board of D1 to the extent of stultifying and silencing it to inaction, leads to the inevitable result that any judgment in default entered can only be entered 'otherwise than in strict compliance with the rules or some statute or is entered as a result of some improprierty which is considered to be so serious as to render the proceedings a nullity'.

[27] I thus hold that the judgment in default entered was an irregular judgment and D1 having acted promptly in the circumstances of the case to have it set aside, D1 is entitled to have it set aside *ex debito justitiae*.

Whether if the judgment in default is a regular judgment does D1 have a defence on the merits

[28] Assuming for a moment that the judgment entered in default is nevertheless a valid and regular judgment for having complied with the relevant provisions on service and entering appearance in the Rules of the High Court 1980 ('RHC') though from the perspective of control of companies it smacks of some impropriety, I shall proceed to consider if D1 has some defence on the merits.

[29] His Lordship Lee Hun Hoe, the former CJ (Borneo) in the Supreme Court case of *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 at p 41 gave an elucidation on the meaning of 'defence on the merits':

> Where judgment is entered on the failure of a defendant to take any of the procedural steps laid down under the Rules of the High Court 1980, the court has an absolute discretion to set aside the judgment, if necessary, on terms and allow the case to be heard on the merits. Lord Atkins stated clearly the principles in which the court should act in *Evans v Bartlam* [1937] AC 473 in these words:
>
> … The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

[30] In the instant case the learned judge did not consider the judgment to be

irregular. *Mallal's Supreme Court Practice*, (2nd Ed), Vol I at p 84 explains the position where the judgment is regular thus:

> The discretion will only be exercised if the affidavit supporting the application to set aside discloses facts showing a defence on the merits; or for some very sufficient reason: *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23; *Farden v Richter* (1889) 23 QBD 124.

A defence on the merits means merely raising only an arguable or triable issue, eg contributory negligence in a running down case in *White v Weston* [1968] 2 QB 647. A judgment in default is not a judgment on the merits: *L Oppenheim & Co v Mahomed Haneef* [1922] 1 AC 482. (Emphasis added.)

[31] His Lordship Jemuri Serjan former CJ (Borneo) in the Supreme Court's decision of *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 said at pp 321–322 clarified the approach the court should take with respect to what amounts to a defence on the merits:

> To use common and plain language, the application must show that his defence is not a sham defence, but one that is prima facie, raising serious issues as a bona fide reasonable defence … It involves a mental process that goes through the mind of the judge when making a decision in any case, weighing the evidence of the litigant against that of another on the facts alleged …

[32] As D1 has maintained that there is a valid arbitration clause in the loan agreement by s 15 thereof, D1 was careful not to be seen to have taken a step in the proceeding by the proposed defence, set-off and counterclaim that it intended to file. Whilst it had referred to its various defences, set-off and counterclaim in its affidavits filed in support of its application to set aside the JID, it had also in Part C of its submission set out the whole of its defence, set-off and counterclaim. There is a note at the beginning of the defence that reads:

> The 1st Defendant files this provisional proposed Defence, Set-Off and Counterclaim without prejudice to its right to refer the dispute to arbitration and that all matters pleaded herein shall be put before a sole arbitrator to be appointed, the proceedings at the High Court be stayed under Section 6 of the Arbitration Act 1952 and/or Section 10 of the Arbitration Act 2005 and does pray:
>
> For an order that under the Arbitration Act 2005 (and if that is inapplicable under any previous written law), the entire dispute between the 1st Defendant and the Plaintiff be referred under the arbitration clause set out under Part 13, Section 15 of the Loan Agreement dated 26.6.1997.
>
> Defence of Inducement and coercion in entering into loan agreement dated 26 June 1997.

[33] The crux of this defence is that D1 was induced and coerced in entering into the loan agreement by illegitimate pressure brought to bear upon it by the plaintiff and/or that in any event that loan agreement was void and unenforceable by reason of the various issues raised in the proposed defence, set-off and counterclaim.

[34] D1 stated that it was at all material times licensed by Photran USA to manufacture in Malaysia and market high performance optical and electricity conducive film coated products ('the products'). At the invitation of D1 through one Bryn Williams and D2 (then the only directors of the company), the State Government of Melaka and Zeron Sdn Bhd ('Zeron') entered into a memorandum of understanding (MOU) with D1 on 23 November 1994 wherein the parties agreed to establish, and to become members in a joint venture company D1 which would manufacture the products. Following the said MOU the plaintiff (the nominee of the State Government of Melaka), Zeron and D1 executed a shareholders' agreement on 1 December 1994 ('the shareholders' agreement'). See paras 4–6 of the defence, set-off and counterclaim.

[35] By the shareholders' agreement, the said Bryn Williams agreed to allot 8,000,000 ordinary shares in D1 which was beneficially owned by him, as follows:

Parties	No of shares	Percentage
The Plaintiff	1,600,000	20%
Zeron	4,000,000	50%
Bryn Williams & D2	2,400,000	30%

[36] D1 said in para 8 of the proposed defence that in consideration of the allotment to it of 1,600,000 ordinary shares, the plaintiff undertook to assist D1 to apply and obtain from a bank or other financial institution an irrevocable letter of credit requires in relation to the purchase from Photran USA of the machinery needed to set up a plant in Malaysia for manufacturing the products. D1 further pleaded in the proposed defence that it was the understanding between the parties to the shareholders' agreement that each of them would contribute towards all payments which had to be made to Photran USA in respect of the licence granted to D1 ('the licence agreement'), the purchase of the machinery and D1's working capital, such contributions to be in the proportions of their share holdings. Section 9.2 ('shareholding proportion') and section 9.3(i) ('shareholders' loans').

[37] D1 pleaded in para 10 of its proposed defence that on 6 December 1994, Bryn Williams paid Photran USA a sum of £2,000,000 due under the licence agreement.

[38] By para 11, D1 pleaded that Bryn Williams informed the Board at the Board of Directors' meeting of D1 held on 30 May 1995 that on a proportional basis the contribution of the shareholders for the initial machinery (one line of machineries only) would be:

Parties	No of shares	Percentage
The plaintiff	RM4,600,000	20%
Zeron	RM 11,500,000	50%
Bryn Williams & D2.	RM6,900.000	30%

[39] The plaintiff paid D1 the sum of RM4,600,000 in the following manner: a sum of RM1,840,000 on 28 September 1995 and a further sum of RM2,760,000 on 14 December 1995. The said sum of RM4,600,000 was deemed as the plaintiff's contribution to its shareholder's equity in D1 and this is captured in exh LLY17 which is the minutes of the Board of Directors meeting of D1 dated 30 May 1995.

[40] On 17 December 1996, D1's Board of Directors ratified, by a resolution the conditions of sale for the supply of the products by Photran US Ltd UK to D1 at the purchase price of RM46,000,000.

[41] By para 19 of the proposed defence, D1 stated that since the execution of the shareholders' agreement a total of RM44,404,608 had been paid on behalf of D1. Of that the plaintiff had paid RM4,600,000.

[42] By para 20 of the proposed defence, D1 stated that Bryn Williams and D2 had between themselves paid out altogether a total amount of RM35,294,608 with the details being set out:

No	Particulars	Amount(RM)
(a)	A sum of RM20,984,323 as set out in the Annual Account of D1 for the year ended 31 December 1996 was approved by the shareholders of D1 on 13 October 1997	RM20,984.323
(b)	A sum of £1,700,000 (equivalent to RM11,000,000) on 28 February 1997	RM11,000,000
(c)	A sum of £517,232 (equivalent to RM3,310,285) on 28 September 1999.	RM3,310,285
	Total	**RM35,294,608**

[43] More particularly, D1 pleaded in para 21 of the proposed defence that when required to make a further payment of RM4,600,000 in or about June 1997, the plaintiff was unable, or unwilling to do so, unless D1 accepted, inter alia, its 'condition' that the said sum of RM4,600,000 and the two sums it had earlier paid (totalling RM9,200,000 in the aggregate) were treated 'as a loan' by the plaintiff to D1.

[44] By para 22 of the proposed defence, D1 pleaded that both Bryn Williams and D2 as the minority shareholders of D1 were compelled to accept the condition imposed by the plaintiff as the payment of the RM4,600,000 was required to be made urgently by D1 since the failure to pay the sum would be a breach of the conditions of sale and could result in the machinery and equipment not being supplied to D1.

[45] Paragraphs 23–25 of the proposed defence further stated that in those circumstances, a loan agreement in respect of the sum of RM9,200,000 was executed between the plaintiff and D1 on 26 June 1997 with D2 providing the plaintiff a letter of indemnity of the same date secured by the properties of D2. On 26 June 1997, upon being provided with the security aforementioned, the plaintiff paid out the sum of RM4,600,000. On 13 October 1997 D1 formally adopted the loan agreement and letter of indemnity by a resolution of its Board of Directors, the majority of whose members were representatives of the plaintiff.

[46] In para 26 of the proposed defence it was further pleaded by D1 that when Zeron was not able to transfer the land referred to earlier, the directors of D1 resolved that the 10,000,000 ordinary shares issued to it be cancelled and that they be allotted and issued instead to the plaintiff in consideration of the plaintiff transferring to D1 a portion of a piece of industrial land which it owned and which was then under a master title HS (D) No 3521, PT No 871, Mukim of Sg Barullir, District of Alor Gajah, State of Melaka ('the portion of land'). The said portion of the land which the plaintiff was to transfer to D1 would be utilised as security for facilities required by D1.

[47] D1 pleaded by para 28 of the proposed defence the following: On the 27 November 1997 the plaintiff executed an agreement (the land transfer agreement). The land transfer agreement provides, inter alia:

(a) that the value of the portion of land was to be mutually agreed at RM16,000,000;

(b) that upon execution of the agreement D1 would allot and issue to the plaintiff 10,000,000 ordinary shares in D1 and credit an amount of RM6,000,000 in D1's account as an advance/loan from the plaintiff to D1; and

(c) that the plaintiff would, upon issuance of a separate document title in respect of the portion of land transfer the portion of land to D1.

[48] Vide para 29 of the proposed defence, pursuant to the land transfer agreement, 10,000,000 ordinary shares in D1 were issued to the plaintiff on 10 September 1997 and an amount of RM6,000,000.00 was credited to the plaintiff in D1's account. Since then the shareholders of, and their shareholdings in D1 (by numbers and proportions of shares held) became as follows:

Shareholders	Shareholdings	Proportion of Shares held
The plaintiff	14,000,000	70%
D2	3,000,000	15%
Bryn Williams	3,000,000	15%

[49] However as the portion of the land was not transferred to D1 it would appear that the plaintiff has to-date failed to provide the consideration for the 10,000,000 shares referred to above.

[50] Learned counsel for the plaintiff Mr SM Shanmugam submitted that it is too late in the day for D1 to raise the defence of undue influence or coercion as His Lordship the late Abdul Wahab Said J, In *Yayasan Melaka v Photran Corp Sdn Bhd & Anor* [2007] 7 CLJ 308 at p 315 had observed:

> ... The suggestion that the plaintiff had with its 70% majority in first defendant deliberately allowed the JID thereby preventing first defendant from raising this issue is unfounded. The second defendant never raised any of the issues until some seven years after the agreement and indemnity had been signed. As for as the loan agreement is concerned, the plaintiff had obtained a judgment in default against the first defendant on 12 August 2003. Until that judgment is set aside that judgment is good as against the first defendant and no issue of undue influence or coercion or even want of consideration should be entertained in respect of the loan agreement. These issues are res judicata between the plaintiff and the first defendant under that judgment.

[51] It is to be noted that His Lordship had not given any reason for coming to the conclusion that the suggestion that the plaintiff had with its 70% majority in D1 deliberately allowed the JID thereby preventing D1 from raising this issue is unfounded. It may be asked why then was no appearance entered by D1 when D2 as a director felt duty-bound to write to the Board of D1 to alert the board members on the need to engage a solicitor to enter appearance for D1. The company D1 new registered office is the same as that of the plaintiff. Even if it be an oversight, there is still the pattern of inaction in the action by Perbadanan Melaka against D1 for unpaid secretarial fees of a

paltry sum of RM1,505. The company secretary for Perbadanan Melaka is the same as for D1. Then there is the winding up petition against D1 that went undefended. All these cries out for an explanation and the only possible explanation was that the majority of the directors aligned to the plaintiff sat still and folded their arms with a 'could not care less' attitude. I do not think that His Lordship is saying that D1 would be precluded from applying to set aside the JID taken against it. Indeed His Lordship was conscious of the fact that D1 was not before it and said at p 317 of his judgment that:

> The defence and the counterclaim premised *on the alleged coercion and undue influence caused to the first defendant is irrelevant to the second defendant* because s 19 of the Contracts Act 1950 expressly provides that the contracts are 'voidable at the option of the party whose consent was so caused', that is, the first defendant. The second defendant cannot, in law, avoid the contracts on the basis of the alleged coercion and undue influence caused by the first defendant. (Emphasis added.)

[52] As the matter before His Lordship was not a matter where D1 was before His Lordship but merely D2 was and having held that the alleged coercion and undue influence caused to D1 is irrelevant to D2, I do not think that res judicata would have applied to D1 who was not before the court. If res judicata applies in the strict sense between the plaintiff and D1 just because a JID had been obtained against D1, then I cannot countenance a situation where a defendant can validly apply to set aside the JID. I do not think that His Lordship would have intended his dicta to have been interpreted that way. I therefore hold that the remarks made with respect to D1 in the above judgment are merely orbiter as the issues raised did not concern D1 but D2 who was before the court.

[53] Even in the oft-quoted dicta of His Lordship Peh Swee Chin FCJ, *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, it must not be forgotten that the res applies only to parties before the court and even then it must have been a matter adjudicated upon. His Lordship onserved at pp 197–198:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.

[54] I had occassion to put some restrain on a too pervasive application of the principle of res judicata in *Sharikat Permodalan Kebangsaan Bhd v Jalinan Waja Sdn Bhd* [2011] 7 CLJ 865 at pp 880–881 as follows:

> The test to be applied in deciding whether res judicata can be raised to bar a present application based on a past application is found in the clear exposition of Gopal Sri Ram JCA (as he then was) in *Golden Vale Golf Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31, at pp 37–38:
>
> Learned counsel for the plaintiff drew our attention to certain passages in the judgment of Siti Norma Yaakob JCA in which the merits of the case appear to have been discussed. The comments in these passages are mere obiter dicta and do not constitute the ratio of the case. *It is only the ratio of the case which is binding between the parties to a dispute or their successors.* … Further, to constitute res judicata, 'the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 at p 53, *'necessarily and with precision' determine the point in issue' … These issues were not at stake before this court in the earlier proceedings. It is therefore our judgment that the plea of res judicata cannot succeed.* (Emphasis added.)

[55] Further explanation of this principle is found in *Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 MLJ 209 at p 212; [1998] 3 CLJ 335, at p 337–338, where the Court of Appeal clarified as follows:

> Nothing could be clearer than that Richard Talalla J made no adjudication on the point that the application to set aside Siti Norma Yaacob J's judgment was served out of time. All that Richard Talalla J found was that the judgment of Siti Norma Yaakob J that was served on the defendant has to be a sealed copy. In fact, it was a sealed copy of the judgment that the defendant received from the plaintiff on 3 February 1994. The judge did not make any adjudication on the point under O 42 r 13 which was that the defendant's application to set aside the judgment was served on the plaintiff more than thirty days after the defendant had received the sealed judgment of Siti Norma Yaakob J. *When the judge in the earlier proceedings made no adjudication, the plea of res judicata must fail.* (Emphasis added.)
>
> The same approach and attitude is taken by the Court of Appeal in *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 CLJ 440, at p 448:
>
> In my judgment, it is of the essence, in cases of this nature, when the plea of res judicata is taken, *to identify with precision the issue that was decided in the earlier proceedings*, which it is contended operates as a bar to relitigation because to constitute a res judicata, the earlier judgment must, necessarily and with precision determine the point in issue. (Emphasis added.)
>
> While the principles propounded were in the context of a previous and past proceeding vis-a-vis a present proceeding, the same principle is applied to a previous and past application and a present application. One application is for an injunction and the current one is for an amendment of the writ.

A They are poles apart and the considerations are also different. Whilst a judge hearing an application may say in passing why the plaintiff's injunction is not granted as perhaps that the words are on the face of it not defamatory or that the writ here without the statement as stipulated in O 78 r 2 is defective, these are merely obiter remarks and not the ratio of the case. Neither is they findings that must be B particularly and peculiarly decided with precision for a determination of the application for an injunction. Little wonder that a judge in hearing an application for an injunction cannot on his own strike out a plaintiff's claim merely because he thinks the writ is defective or that the plaintiff has no cause of action. These are not matters that have particularly and peculiarly proceeded for precise pronouncement by the court. Anything said in the process that does not come within that parameter C is said only by way of passing and it would not prejudice a party from putting in an application that now calls for a full and focused finding and determination.

[56] Viewed in the light of the history of the case in the events that led to the D joint venture, the defence of undue influence and coercion should be allowed to be ventilated. This is not a stage to analyse with minute examination or microscopic precision the strength or likelihood of success of this defence which on the face of it is not totally frivolous. There was also another objection taken by the learned counsel Mr SM Shanmugam. He argued that D1 had not E enclosed a copy of his proposed defence to his affidavit and that that is fatal. For support he quoted His Lordship Low Hop Bing J, (as he then was) in the High Court case of *Majlis Amanah Rakyat v Ismail bin Maskor & Ors* [2006] 3 MLJ 281 at p 286–287; [2006] 5 CLJ 230 at p 228:

F In my judgment, it would serve a useful purpose to enumerate the relevant principles governing the setting aside of a regular judgment as follows:

(1) Before setting aside a default judgment, the court must be satisfied on the affidavits that there is defence on the merits: see eg *Tan Ooi Chee & Anor v Kanching Realty Sdn Bhd* [1989] 1 MLJ 519; *Pengkalen Concrete Sdn Bhd*; *Tiong Kieng Seng*; and *Yap Teck Ngian*;

G

(2) The defendant has to establish the defence on the merits by at least filing a draft defence for the court to consider: see eg Pengkalen Concrete; and …

[57] Further His Lordship Suriyadi Halim Omar J, (as he then was) in the H High Court case of *Pengkalen Concrete Sdn Bhd v Chow Mooi & Anor (guarantor of Kin Hup Seng Construction Sdn Bhd)* [2003] 3 MLJ 67; [2003] 6 CLJ 326 at p 331 also expressed a similar sentiment:

I In the current case, it was indisputable that the defendants had failed to produce that all important draft statements of defense. Without them, I was thus without any option but to find again for the plaintiff, even on this second ingredient. Not only was there no prima facie defence, raising serious issues as bona fide reasonable defence that ought to be tried, but there was not even a sham one (*Hasil Bumi Perumahan & Ors v United Malayan Banking Bhd* [1994] 1 CLJ 328). Not wishing to encourage a sham defense, and rhetoric aside what else could have I done?

> Common sense would convince anyone that to allow the appeal, and set aside a default judgment when no prima facie defence worthy of consideration was before the court, would portray the court as lame ducks prolonging the agony of all parties. Without them before me, I could only conclude that the defendants were definitely not serious in their attempts to challenge the plaintiff — delaying and defeating the latter from taking up more anticipatory drastic actions during these bad times, and waiting for better ones, being one of the conclusions that I could arrive at.

[58] I think the facts in the above two cases cited can be clearly distinguished. Here the defence on the merits have been referred to in the three affidavits filed in support of the application to set aside. Further in the draft defence, set-off and counterclaim filed together with the written submission of D1 there is set out 95 paragraphs in 51 pages of averments of what D1 considers to be material facts. The plaintiff cannot be said to have been prejudiced in having no clue whatsoever as to the defence raised. I thus hold that where the affidavit in support of the application to set aside the JID has disclosed the defences that the defendant is relying on, that would suffice. I also bear in mind that D1 here is taking the stand that the dispute should be referred to arbitration and hence it did not want to be unfairly construed as having taken a step in the proceeding and thus precluded from applying for a stay for the matter to be referred to arbitration just because it had proposed to file a defence a draft copy of which is attached to its affidavit in support.

Whether the plaintiff was in breach of the shareholders' agreement and the land transfer agreement

[59] Under the shareholders' agreement the plaintiff undertook to assist D1 to apply and obtain from any banks or financial institutions an irrevocable letter of credit. The plaintiff agreed to contribute to funds required for the purpose of the business of D1. The plaintiff further agreed to take all necessary steps to give full effect to the provisions of the agreement and to procure through its directors that D1 and the directors do perform and observe the provisions of the agreement. Under the land transfer agreement, the plaintiff was to, inter alia, transfer the said land to D1 to enable D1 to utilise the same as a security for facilities required by D1. D1 asserted in the proposed defence that the plaintiff has to-date failed to transfer the said land to D1.

[60] Further as evidenced in a Board of Directors' meeting held on 9 August 2000, as a result of the directive of the Chief Minister ie the State Government of Malacca, the plaintiff has been directed not to inject further funds into D1.

[61] D1 argued that this is a breach of the shareholders' agreement as well as a breach of the land transfer agreement.

[62] D1 further pleaded that the plaintiff by compelling D1 to execute the loan agreement, the plaintiff was clearly in breach of its fiduciary duties to D1 vis-a-vis the shareholders agreement. D1 argued that the shareholders agreement is in essence and substance a joint venture between the plaintiff, Bryn Williams and D2 and that D1 was in fact the joint venture vehicle. In the circumstances, D1 contended the plaintiff owes a fiduciary duty to its other joint venturers as well as D1. Further, being in a joint venture, there is an express and/or implied duty on the plaintiff to use his best endeavours to ensure the success of the venture. In *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 ML J 481 at p 497, His Lordship Gopal Sri Ram JCA (as he then was) observed that:

> It is settled that parties to a joint venture stand in a fiduciary position to each other. The scope and extent of the duties that joint venturers owe each other depends upon varied considerations. These would encompass (but not limited to) the nature of the particular joint venture, it's subject matter, the relevant documents passing between the parties, including any agreement upon which the particular joint venture is founded and the attendant circumstances. Here, as in other areas of equity jurisprudence, there is no substitute for s meticulous examination of the facts. If authority is required for these propositions it may be found in the decision of the Supreme Court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474.
>
> It is axiomatic that mutual trust and confidence between joint venturers is essential for the proper working of the relationship. And where, as in the present instance, there is reliance by one joint venturers upon the skill or expertise professed by the other in the subject matter of the enterprise, there is, in my judgment, a duty upon that other to use his best endeavours to ensure the success of the venture. Equity will, in my view, imply such an obligation in the absence of an express term in the particular joint venture agreement.

[63] Taking the cue from the above observations as to the fiduciary position that joint venturers stand towards one another, when as in here D1 alleges breach of the shareholders agreement and the land transfer agreement, the very least is to give D1 the opportunity to be heard rather than allowing a JID to remain which was entered against it when it was voiceless and powerless to act for itself.

[64] Even by taking a cursory reading of the prayers prayed for by D1 in its proposed defence, set-off and counterclaim, it reveals that there are issues that ought to go for trial and certainly not a case where D1 ought to be shut out *in limine*. The prayers are set out below:

> 96 And the 1st Defendant claims as against the Plaintiff:
>
> (1) For an order that under the Arbitration Act 2005 or 1952 whichever applicable, (and if that is inapplicable under any previous written law), the entire dispute between the 1st Defendant and the Plaintiff be referred to arbitration under the

arbitration clause set out under Part 13, Section 15 of the Loan Agreement dated 26.6.1997, and that all prayers hereinafter prayed for be referred to the same, and all proceedings before the High Court be stayed under Sec 6 of the Arbitration Act 1952 or Section 10of the Arbitration Act 2005;

(2) Or, in the alternative, for the following relief, commencing at paragraph (3) herein, in favour of the 1st Defendant:

(3) A declaration that by reason of Melaka Foundation Enactment 4 of 1994 all contractual transactions entered into by the Plaintiff with the 1st Defendant are ultra vires, and consequently the 1st Defendant prays for the following relief:

(a) A declaration that the Shareholders' Agreement, the Loan Agreement, and the Land Transfer Agreement be declared null and void and unenforceable;

(b) And further, by reason of the Plaintiff intermeddling in the 1st Defendant's affairs and assets, that the Plaintiff its servants agents or nominees account for, disgorge and pay over to the 1st Defendant all damages sustained by the 1st Defendant;

(c) And further an order granting leave to the 1st Defendant to trace the assets of the 1st Defendant into the hands of the Plaintiff, its servants and or agents and or nominees, or any person, body corporate or entity, that has intermeddled with the 1st Defendant's assets.

(4) Alternatively, in the event prayer (3) is not be granted by this Honourable Court, the 1st Defendant prays for the following relief:

(a) A declaration that the Shareholder's Agreement is and was valid at the material time, and was repudiatorily breached by the Plaintiff;

(b) A further declaration that the 4,000,000 shares issued by the 1st Defendant to the Plaintiff, being equivalent to 20.0% of the total issued share capital of the 1st Defendant, was in fact paid for by the Plaintiff as proper consideration by its payment of RM9,200,000.00 to the 1st Defendant for the issuance and allotment of the 4,000,000 shares aforesaid as set out under the Shareholders' Agreement and as confirmed at the Board Meeting dated 30.05.1995;

(c) Consequently, a declaration that the 1st Defendant had nothing due and owing to the Plaintiff at the time the Plaintiff commenced this action;

(d) An order that the sum of RM35,294,608.00 being monies advanced by the other shareholders, namely Bryn Williams and Lim Lek Yan, to the 1st Defendant, be capitalized and allotted as ordinary issued and paid up shares to the said Lim Lek Yan and to the said Bryn Williams in the ratio of their respective contributions, and that the 1st Defendant be authorized to do so;

(e) And an order that any damages sustained by the 1st Defendant by the conduct of the Plaintiff its servants agents and or nominees be assessed and paid forthwith by the Plaintiff to the 1st Defendant.

(f) Consequently, a declaration that the Loan Agreement was void and unenforceable by reason of a want of consideration;

(g) Alternatively, should this Honourable Court be of the view that the Loan Agreement was valid and subsisting, then an order that the said RM9,200,000.00 outstanding to the 1st Defendant being consideration for the allotment of 4,000,000 shares in the 1st Defendant to the Plaintiff;

(5) Alternatively, as regards the Land Transfer Agreement, should this Honourable Court be of the view that it is a valid and subsisting agreement, then the 1st Defendant prays for the following relief:

(a) Specific Performance of the Land Transfer Agreement dated 27.11.1997 for transfer of Pajak Negeri Title No. 44768 Lot No. 8442 in the Mukim of Sungei Baru llir, Daerah Alor Gajah, Melaka measuring approximately 48.11 Hectar (formerly held under a master title H.S. (D) No. 3521, P.T. No. 871, Mukim of Sg. Baru llir, District of Alor Gajah, State of Melaka delineated in Red in the layout plain annexed to the Land Transfer Agreement measuring approximately 46,556 acres:

(i) And consequently, that the sum of RM6,000,000.00 credited to the Plaintiff pursuant to the Land Transfer Agreement be capitalized by the issue of a further 6,000,000 ordinary shares in the 1st Defendant to the Plaintiff; and that the 1st Defendant be authorized to do so;

(ii) And consequently, an order that the sum of RM35,294,608.00 being monies advanced by the other shareholders, namely, Bryn Williams and Lim Lek Yan, to the 1st Defendant, be capitalized and allotted as ordinary issued and paid up shares to the said Lim Lek Yan and to the said Bryn Williams in the ratio of their respective contributions, and that the 1st Defendant be authorized to do so;

(iii) Further an injunction restraining the 1st Defendant, whether by its servants or agents or otherwise from selling, disposing or otherwise dealing with the said Land, until the disposal of the action herein or until further order,

(b) further and/or in the alternative,

(i) damages in lieu of an/or in addition to prayer (5(a)) above be assessed and paid by the Plaintiff to the 1st Defendant and in addition such sums as are due from the Plaintiff be set off as against the Plaintiffs claims;

(ii) in any event that the capitalization prayers as set out in paragraph 5(a)(iii) be granted;

(c) In the alternative, should this Honourable Court be of the view that the Land Transfer Agreement is unenforceable; then the 1st Defendant prays for the following relief:

(i) an order that the sum of RM35,294,608.00 being monies advanced by the other shareholders, namely, Bryn Williams and Lim Lek Yan,

to the 1st Defendant, be capitalized and allotted as ordinary issued and paid up shares to the said Lim Lek Yan and to the said Bryn Williams in the ratio of their respective contributions, and that the 1st Defendant be authorized to do so;

(ii) That the RM6,000,000.00 that has been credited in the 1st Defendant's account in favour of the Plaintiff be cancelled, and the allotment and the issuance of the 10,000,000 by the 1 Defendant to the Plaintiff be also cancelled; and that the 1st Defendant be authorized to do so;

Consequent to prayer 5(c) above, that any and all resolutions or measures passed by the 1st Defendant whilst the Plaintiff, its servants agents and or nominees were in control of the Board be declared null and void, and any damages sustained by the 1st Defendant as a consequence thereof be assessed and paid by the Plaintiff to the 1st Defendant;

(6) Damages for the Plaintiffs breach of its duties for the various causes of action pleaded above, including but not limited to as constructive trustee for the 1st Defendant, for the following;

(a) damages for the Plaintiffs breach of its duties of fiduciary to the 1st Defendant,

(b) additionally or alternatively, damages for the Plaintiffs intermeddling in the 1st Defendant assets, including its machinery, appropriating the same or the proceeds thereof for itself, and all consequential damages flowing thereform,

(c) additionally or alternatively, damages for breach by the Plaintiffs servants or agents of section 132(2) of the Companies Act 1965,

(d) additionally or alternatively, damages for breach of contract,

(e) additionally and in the alternative, damages for fraud, and/or actionable non disclosure, and/or conspiracy to injure;

(f) further, that the Plaintiff, its servants and/or agents is to account to, to the 1st Defendant for the machinery and to the proceeds of the sale thereof, and to forthwith pay over the same to the 1st Defendant;

(g) all necessary and consequential accounts, directions and inquiries,

(h) and further, by reason of the Plaintiff intermeddling in the 1st Defendant's affairs and assets, that the Plaintiff its servants agents or nominees account for, disgorge and pay over to the 1st Defendant all damages sustained by the 1st Defendant;

(i) And further an order granting leave to the 1st Defendant to trace the assets of the 1sst Defendant into the hands of the Plaintiff, its servants and or agents and or nominees, or any person, body corporate or entity, that has intermeddled with the 1st Defendant's assets.

(7) Interest at the rate of 8.0% per annum on all sums awarded by this Honourable Court from the date when each sum became due to the date of final satisfaction or sooner payment

(8) By reason of the conduct of the Plaintiff, its servants and or agents, that the 1st Defendant be paid costs on an indemnity basis

(9) Such further and other relief, or direction as this Honourable Court deems just and expedient.

PRONOUNCEMENT

[65] In the light of the reasons given above, I had allowed D1's appeal against the decision of the SAR and I allowed the judgment in default against D1 to be set aside with costs in the cause.

Appeal allowed with costs in the cause.

Reported by Kohila Nesan